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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JAY PRINTZ, Sheriff/Coroner, Ravalli County, Montana,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

RICHARD MACK, Sheriff, Graham County, Arizona,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the interim background check provisions of the Brady Act violate constitutional principles of political accountability.

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INTEREST OF THE *AMICI CURIAE*

Amicus Council of State Governments is a multi-branch organization whose members include all fifty state governments and United States territories. *Amicus* National Conference of State Legislatures is a bipartisan organization representing the legislatures of the fifty States and American territories and commonwealths. *Amici* and their members have a compelling interest in legal issues that affect the role of the States in our federal system. In *amici*'s view, this case is not about gun con-

trol policy. It raises, instead, an important question about "the proper division of authority between the Federal Government and the States." *New York v. United States*, 505 U.S. 144, 149 (1992). *Amici* accordingly submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

1. Under the Gun Control Act of 1968 (GCA), the federal Bureau of Alcohol, Tobacco and Firearms (ATF) licenses and regulates firearms manufacturers, importers, and dealers. 18 U.S.C. §§ 921 *et seq.* The GCA prohibits these federal licensees from selling firearms to persons who are within any one of eight federally determined categories of ineligible purchasers, including persons who have either been convicted of, or are under indictment for, crimes punishable by imprisonment for more than one year; unlawful users of controlled substances; persons who have been adjudicated as mentally defective or committed to any mental institution; and persons subject to judicial restraining orders in domestic disputes. *See* 18 U.S.C. § 922(d).

The Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, Tit. I, 107 Stat. 1536 (1993) (Brady Act), amends the GCA to assist federal licensees to avoid selling firearms to ineligible persons. The Brady Act establishes interim provisions for pre-sale background checks of handgun purchasers and permanent provisions for pre-sale background checks of firearms purchasers. *Compare* 18 U.S.C. § 922(s)(1) *with id.* § 922(t)(1). The permanent provisions direct the federal government to establish a national instant criminal background check system by November 30, 1998. *Id.* § 922 Note. After this computerized national system is established, federal firearms licensees, subject to certain exceptions, may not transfer a firearm unless they contact that system and obtain a

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

"unique identification number" for the transfer. *Id.* § 922(t)(1) & (3). The federal computer system may not assign a unique identification number if (1) receipt of the firearm would violate federal law because the purchaser is ineligible under one of the eight federal law categories or (2) receipt would violate state law. *Id.* § 922(t)(2); *see also id.* § 922(g) & (n).

Although regulation of firearms under the permanent provisions of the Brady Act is an exclusively federal program, the interim background check provisions require state or local law enforcement officials to regulate handgun transfers between federal licensees and private purchasers. Under the interim program, which is in effect for up to five years (until the national instant check system is established), federal firearms licensees who intend to transfer a handgun must obtain a statement of the name, address, and date of birth of a prospective purchaser and a statement that the purchaser is not ineligible under the various categories of federal law. *Id.* §§ 922(s)(1)(A)(i)(I), 922(s)(3)(A) & (B). Federal licensees must give notice and a copy of this information to "the chief law enforcement officer" (CLEO) of the transferee's residence. *Id.* § 922(s)(1)(A)(i)(III) & (IV). Federal licensees may not transfer a handgun (1) unless they receive notice from the CLEO that this officer has no information that receipt or possession of the handgun by the transferee would violate federal, state, or local law or (2) until five business days have elapsed after providing notice and they have not received information from the CLEO that the transfer would violate federal, state, or local law. *Id.* § 922(s)(1)(A)(ii).

The Brady Act defines a "chief law enforcement officer" as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." *Id.* § 922(s)(8). A CLEO may be either a local or a state official. *See* 59 Fed. Reg. 37,532, 37,533-34 (July 22, 1994) (list of CLEOs includes both state and local officials); U.S. General Accounting Office, *Gun Control: Implementation of the Brady Handgun Violence Preven-*

tion Act (GAO/GGD-96-22) (Jan. 1996) (hereinafter GAO Report) at 14 n.8 (state police departments serve as CLEOs in some States).

The Brady Act imposes three duties on these state or local law enforcement officials.[2] First, the CLEO must conduct a background check on prospective handgun purchasers. The CLEO "shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." 18 U.S.C. § 922(s)(2). Second, if the CLEO determines that a handgun transfer does not violate federal, state or local law, then this state or local official "shall * * * destroy" the federal licensee's statement of information about a prospective purchaser and related records. *Id.* § 922(s)(6)(B)(i). Third, if the CLEO determines that an individual is ineligible to receive a handgun, then this state or local official, at the request of such individual, "shall provide" the reason for this determination "in writing within 20 business days after receipt of the request." *Id.* § 922(s)(6)(C).

All three duties imposed on CLEOs by the Brady Act are judicially enforceable. Although the federal government has determined that the criminal penalty provisions of the Brady Act do not apply to CLEOs,[3] *id.* § 924(a)(5), it has also determined that "injunctive relief may be an

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[2] The interim provisions of the Brady Act do not apply in States and territories that screen handgun purchasers through a permit system or other procedures that meet federal standards. *See* 18 U.S.C. § 922(s)(1)(C) & (D).

[3] A CLEO is also immune from liability for damages arising out of performance of these duties. 18 U.S.C. § 922(s)(7). Nonetheless, a person erroneously denied a firearm "may bring an action against the State or political subdivision responsible for providing the erroneous information, or responsible for denying the transfer, * * * for an order directing that the erroneous information be corrected or that the transfer be approved" and for attorney's fees. *Id.* § 925A.

option to compel law enforcement officials to fulfill their responsibilities under the [Brady] act." *Compare* Office of Legal Counsel Memorandum, Mar. 16, 1994 *with* GAO Report at 7; *id.* at 88-90 (App. V—Department of Justice Letter to GAO, Nov. 8, 1995).

2. Shortly after enactment of the Brady Act, the ATF issued an "open letter" to guide CLEOs in its implementation. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Open Letter To State And Local Law Enforcement Officials (Jan. 21, 1994) (reprinted in Br. for U.S., No. 95-1478, App. 1a-23a) (hereinafter U.S. App.). ATF stated that the Brady Act "clearly anticipates some minimal effort to check commonly available records," that "a reasonable effort should be made to determine whether the buyer has a criminal record," and that in States with centralized mental health records CLEOs could search these records if they were accessible. *Id.* at 13a-14a. The agency noted that "it is difficult to prescribe precisely what must be done in every instance" and that CLEOs have broad discretion to determine what constitutes a "reasonable effort" to ascertain whether receipt of a firearm would violate the law. *Id.* at 14a-15a.

The Attorney General subsequently designated the National Crime Information Center (NCIC) as the national recordkeeping system that CLEOs must consult under the interim program. 59 Fed. Reg. 9498 (Feb. 28, 1994). In addition to these federal computer records, the Attorney General had previously noted that CLEOs could make a much more extensive search of "local, county, state, and national records—whether they are in file folders or computerized." *Frank v. United States*, 860 F. Supp. 1030, 1038 (D. Vt. 1994), *aff'd in part and rev'd in part*, 78 F.3d 815 (2d Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3856 (U.S. June 13, 1996) (No. 95-2006) (quoting letter from Attorney General Reno to Rep. Charles Schumer, Nov. 9, 1993).

Petitioner Jay Printz, Sheriff and Coroner of Ravalli County, Montana, stated that a background check might require one hour to several days. Printz Pet. 5. Peti-

tioner Richard Mack, Sheriff of Graham County, Arizona, stated that background checks consumed one to two man-hours of effort per day. Mack Pet. 6. *See also Frank v. United States*, 860 F. Supp. at 1035 (Vermont sheriff testified that "each background check takes a minimum of fifteen minutes and sometimes up to six hours"). Sheriff Printz noted six types of state and local records to be searched under the Brady Act, and he testified that a simple search of the NCIC computer data is not sufficient.[4] Printz Pet. 4-5, 6.

Sheriff Mack and Sheriff Printz both testified that they had limited resources. Mack Pet. 6; Printz Pet. 4. Sheriff Printz testified that he would have to shift some of his manpower and financial resources from enforcement of state law to enforcement of the Brady Act: "If I am now compelled to perform background checks of our residents, it will have to be done by pulling deputies off patrol and investigation duties." Printz Pet. 4; *see id.* at 5-6; *Romero v. United States*, 883 F. Supp. 1076, 1079 (W.D.La. 1994) (stipulation that Louisiana sheriff did not have sufficient funding both to fulfill state law duties and to undertake additional duties mandated by Brady Act).

Sheriff Printz testified further that duties imposed on him as CLEO under the Brady Act are contrary to state law, which provides that:

> No county * * * or other local government unit may prohibit, register, tax, license, or regulate the purchase, sale, or other transfer (including delay in purchase, sale, or other transfer), ownership, [or] possession * * * of any weapon, including a rifle, shotgun, handgun, or unconcealed handgun.

Printz Pet. 5 (quoting Mont. Code § 45-8-351(1)).

The *Printz* district court expressly found that the impact of the duty to perform background checks was "far

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[4] NCIC data addresses directly only two of the eight federal categories of ineligible purchasers. *Compare* 59 Fed. Reg. 9498 (Feb. 28, 1994) *with* 18 U.S.C. § 922(d).

from *de minimis*": "[t]he ascertainment/background check provision is most burdensome."[5] Pet. App. 60a. For example, the district court found that even the basic determination of "the applicable law on which the ascertainments are made" may be a "substantial undertaking[]" for a CLEO. *Id.* Prospective handgun purchasers who have been "convicted in any court of [] a crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. § 922(d)(1), are ineligible; however, federal law also defines this phrase and excludes "[a]ny conviction * * * for which a person * * * has had civil rights restored * * * unless such * * * restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." *Id.* § 921(a)(20). The district court found, with examples, that the determination of the law, federal or state, governing these inquiries "is not always easily made." Printz Pet. App. 60a n.28.

The court of appeals did not question the district courts' findings. Instead, it concluded that the two sheriffs had "not demonstrated that the Act will interfere unduly with their duties," and the Brady Act did not approach the point of "stall[ing] the state government in its tracks by imposing all-consuming federal duties on the State's employees." *Id.* at 15a.

SUMMARY OF ARGUMENT

1. In the Brady Act, Congress imposed a duty on States to serve as "implements of regulation." *See New York v. United States*, 505 U.S. at 161. Congress made the policy decisions: pre-sale background checks of individuals who purchase handguns from private, federally licensed firearms dealers; destruction of the records associated with the background check within ten days if the sale does not violate the federal, state or local law; and a statement of reasons for a determination that a prospec-

[5] This court did conclude, however, that the effect of the duty to destroy statements and records "can be considered *de minimis* in the absence of the other mandates." Printz Pet. App. 61a.

tive purchaser is ineligible to purchase a handgun. 18 U.S.C. §§ 922(s)(2), 922(s)(6)(B)(i), 922(s)(6)(C). Congress, however, did not provide federal personnel or federal funds to enforce these three handgun transfer laws. Instead, Congress imposed all the administrative and financial costs of enforcement on state and local officials.

The Brady Act provides that a state or local "chief law enforcement officer" (CLEO) "shall" enforce these three handgun transfer laws. *Id.* This duty is enforceable by an injunction. *See* GAO Report at 7. CLEOs must allocate their limited administrative and financial resources to enforce federal law even though their constituents may "prefer their government to devote its attention and resources to problems other than those deemed important by Congress." *New York v. United States*, 505 U.S. at 168.

2. Congress does not have the power under our Constitution to impose a duty on the States to serve as its "implements of regulation." When Congress provides the States with a choice of accepting a conditional grant, or "of regulating [private] activity according to federal standards or having state law pre-empted by federal regulation," then "state officials remain accountable to the people." 505 U.S. at 167-68. The Brady Act does not offer the States any choice; it "compels States to regulate" private handgun transfers and diminishes "the accountability of both state and federal officials." *Id.* at 168; *see also id.* at 168-69, 182-83.

The Brady Act impermissibly blurs the political accountability of both Congress and state officials because responsibility for substantive handgun regulation policies is divorced from the duty to provide the money and personnel to enforce these policies. Congress set handgun regulation policies in the Brady Act without having to take into account the costs of enforcement. The States and local governments must provide the personnel and funds necessary to enforce the Brady Act at the expense of implementing state policies and fulfilling the demands

of their citizens. The Brady Act blurs political accountability in a way that threatens democratic self-governance because CLEOs will be held accountable by their constituents for decreased enforcement of state law even though they did not have any choice about allocating resources to enforce the Brady Act.

3. Although Congress could have authorized state and local officials to enforce the Brady Act and relied on their voluntary cooperation, Congress does not have the power to compel CLEOs to serve as "implements of regulation." Statutes enacted by the earliest Congresses provide an important guide to understanding the Framers' constitutional plan. They confirm this Court's determination in *New York v. United States* that the Constitution does not "permit Congress to employ state governments as regulatory agencies." 505 U.S. at 163. Instead of imposing duties on the States, the Framers anticipated voluntary state cooperation in the enforcement of federal law. *See United States v. Jones*, 109 U.S. 513, 519-20 (1883). For example, from 1789 forward Congress has authorized state officials to arrest federal offenders.

With the special exception of Congress' power to enforce constitutional duties of state officers, this Court has consistently held that Congress cannot "compel the States to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. at 188. Pressing social problems do not justify departures from fundamental constitutional principles. Congress could reasonably have relied on voluntary enforcement or induced state and local officials to cooperate in enforcement of the Brady Act through means that respect constitutional principles of political accountability.

ARGUMENT

I. THE DUTIES IMPOSED BY THE BRADY ACT ON "CHIEF LAW ENFORCEMENT OFFICERS" TO IMPLEMENT FEDERAL RULES FOR PRIVATE HANDGUN TRANSFERS HAVE TWO SIGNIFICANT EFFECTS ON THE STATES

In recent years this Court has considered three distinct categories of federal statutes that have significant effects on the States.[6] The first is congressional enactments that regulate private activity. *See, e.g., United States v. Lopez*, 115 S.Ct. 1624 (1995). The second is federal statutes that "subject state governments to generally applicable laws"—statutes that regulate the States by subjecting them "to the same legislation applicable to private parties." *New York v. United States*, 505 U.S. at 160 (citing *inter alia Gregory v. Ashcroft*, 501 U.S. 452 (1991); *South Carolina v. Baker*, 485 U.S. 505 (1988); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)). Finally, a third category of federal statutes "use[s] the States as implements of regulation."[7] *New York v. United States*, 505 U.S. at 161.

Each of these three categories of federal statutes has significant effects on the States. When Congress regulates an aspect of private activity, it displaces the States' substantive policy choices. *See, e.g., Lopez*, 115 S.Ct. at 1631 n.3. For example, in the Fair Labor Standards Act

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[6] *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 495, 515-36 (1954); D. Bruce La Pierre, *Political Accountability In The National Political Process—The Alternative To Judicial Review Of Federalism Issues*, 80 Nw. U. L. Rev. 577, 636-39 (1985).

[7] In two cases, *FERC v. Mississippi*, 456 U.S. 742 (1982), and *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), this Court upheld Congress' power under the commerce clause to induce the States to implement federal regulations for private activity. *See New York v. United States*, 505 U.S. at 161-62. In *South Dakota v. Dole*, 483 U.S. 203 (1987), this Court upheld Congress' power to condition federal grants on state regulation of the age for drinking alcoholic beverages.

(FLSA), Congress established minimum wage and maximum hour requirements for employees engaged in activities connected with interstate commerce. *See United States v. Darby*, 312 U.S. 100 (1941). Congress' decision to regulate these aspects of the employer-employee relationship has a significant impact on the States: a single substantive policy for private activity determined in the national political process (wage and hour regulation) preempts the States' policy choices (no regulation or different wage and hour regulations).

Federal statutes that regulate the States by extending federally-determined substantive rules for private activity to analogous state activity have a second, distinct effect: the States' choices about goods and services financed through taxes and provided collectively may be altered. For example, when Congress extended the FLSA minimum wage and maximum hour regulations to most state and local government employees, many States complained that the cost of government would be increased and that they would either have to reduce services and benefits or increase taxes. *See, e.g., National League of Cities v. Usery*, 426 U.S. 833, 846-51 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

In addition to regulation of private activity and the extension of generally applicable regulations to the States, federal statutes occasionally require the affirmative exercise of state authority to implement federal regulation of private activity. *See* note 7 *supra*. If, for example, Congress decided to employ the States as its agents in enforcing the FLSA minimum wage and maximum hour regulations against private employers,[8] it might require state legislatures to enact legislation establishing the federal standards as state law, to create state administrative agencies, and to appropriate funds for enforcement. It might require the state executive to administer and en-

[8] The Wage and Hour Division of the federal Department of Labor administers the FLSA. *See* 29 U.S.C. § 204.

force the FLSA regulations, and it might require state courts to adjudicate controversies arising under the FLSA between employers and employees. Such state enforcement of the federal minimum wage and maximum hour regulations would have a major impact: each State would have to allocate its legislative, executive, judicial, and financial resources to satisfy national political demands at the expense of implementing state policies and fulfilling the demands of the State's citizenry.

A. The Brady Act Requires States And Local Governments To Allocate Executive And Financial Resources To Implement Federal Regulations At The Expense Of Enforcing State And Local Laws

The Brady Act includes provisions that fit in both the first and third categories of federal statutes discussed above. The provisions of the Brady Act that require federal firearms licensees to collect information from prospective purchasers, to provide that information to CLEOs, and to delay sale during the five day waiting period, as well as the provisions requiring purchasers to provide this information, are direct federal regulations of private activity. The provisions of the Brady Act that require CLEOs to check the background of purchasers, to destroy records, and to provide a written statement fall within the third category of federal statutes—those that use the States as "implements of regulation."

The three duties imposed on state and local officials have very significant effects. Although the citizens of Ravalli County, Montana or of Graham County, Arizona may "prefer their government to devote its attention and resources to problems other than those deemed important by Congress," *New York v. United States*, 505 U.S. at 168, both Sheriffs must allocate local administrative and financial resources to enforce federal rules governing the transfer of handguns between private parties.

Even if the extent of this effect on individual CLEOs may vary, the effect itself cannot be denied: reallocation of scarce state and local law enforcement resources from

state and local priorities to federal priorities. Ironically, ATF has acknowledged the substantiality of this effect by stating that its "inspectors spend most of their time on higher priority efforts and have no time for inspections related to Brady Act implementation." GAO Report at 52.

B. The Brady Act Requires Some State And Local Officials To Take Actions In Excess Of Or Contrary To Their State Law Authority

Congress did not provide for enforcement of the Brady Act by federal officers, such as ATF agents. Instead, Congress relies on state and local officials to conduct background checks of handgun purchasers. CLEOs in many States and localities may well have adequate authority under state law to regulate in the manner required by the Brady Act. Apart from the diversion of state and local law enforcement resources to federal priorities, the delegation of federal authority to such state and local officers does not impose any additional burdens on the States. Congress is, in effect, simply preserving their authority to regulate private activity that it could otherwise preempt by vesting enforcement authority in federal officials.

In other jurisdictions, however, CLEOs may not have adequate state law authority to regulate handgun sales or, as in the case of Sheriff Printz, they may be prohibited by state law from regulating private handgun transactions. In these circumstances, the Brady Act has a second significant effect: it supplements the authority of state and local officials and alters the States' decisions about the limits of their officers' authority.[9] As one court

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[9] *See generally* D. Bruce La Pierre, *The Political Safeguards Of Federalism Redux: Intergovernmental Immunity And The States As Agents Of The Nation*, 60 Wash. U. L.Q. 779, 843-45, 942, 1023-1033 (1982) (distinguishing federal statutes that delegate federal authority to enforce federal law from federal statutes that supplement state law and purport to empower state officers, agen-

of appeals has noted, the Brady Act "substantively enlarges the duties and authority given the CLEOs by the States, without the States' consent or participation." *Koog v. United States*, 79 F.3d 452, 459 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3017 (U.S. June 25, 1996) (No. 95-2077); *see id.* at 458-59 & n.7.

The Brady Act requires state and local officials to devote their administrative and financial resources to enforce federal regulations and compels some of these officials to take actions beyond their authority under state law. Congress' decision to use state or local officials as "implements of regulation" raises these constitutional questions: whether Congress is politically accountable for these effects; and whether the Brady Act interferes with the political accountability of state and local officials to their constituents.

II. THE BRADY ACT UNCONSTITUTIONALLY INTERFERES WITH DEMOCRATIC SELF-GOVERNANCE IN THE STATES

In drawing the line between state and federal authority, this Court has recognized that the States' role in our federal system is to provide democratic self-governance. For example, although this Court divided sharply in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), over the question whether the power of judicial review is necessary to protect the States' role in the federal system, the entire Court shared the understanding that democratic self-governance in the States is the fundamental value protected by federalism principles. On the one hand, Justice Blackmun, writing for the majority, rejected the power of judicial review because it was not adequate to the task of protecting democratic self-governance in the States. 469 U.S. at 545-47; *see* La Pierre, 80 Nw. L. Rev. at 623-24. On the other hand,

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cies, or political subdivisions to act solely on basis of the delegated federal authority).

Justice Powell argued in favor of judicial review because he believed that "democratic self-government at the state and local levels" was "far more effective" than at the federal level. 469 U.S. at 576 (Powell, J., dissenting).

In subsequent cases, this Court has emphasized political accountability—of both Congress and the States—as the central means of ensuring that the interests of citizens are adequately represented and of protecting democratic self-governance in the States. *New York v. United States*, 505 U.S. at 168-69, 182-83, 185; *see United States v. Lopez*, 115 S.Ct. at 1638 (Kennedy, J., concurring) (noting the importance of "two distinct and discernible lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States"); *id.* at 1651-52 (Souter, J., dissenting) (the legitimacy of federal legislation "comes from Congress's political accountability"); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992) ("Federalism serves to assign political responsibility, not to obscure it.").

A. Political Accountability Is The Test Of Congress' Power To Use States And Local Governments As "Implements Of Regulation"

In *New York v. United States*, this Court measured Congress' power to use the States as "implements of regulation" by the political accountability of both state and federal officials. 505 U.S. at 167-69, 182-83. Two means of providing for state implementation of federal regulations are valid: conditional grants and "the choice of regulating [private] activity according to federal standards or having state law pre-empted by federal regulation." 505 U.S. at 167. Under each of "these two methods * * * of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply." *Id.* at 168. The State "may elect to decline a federal grant," or it "may choose to have the Federal Government rather than the State bear the expense of a federally mandated

regulatory program." *Id.* When "Congress encourages state regulation rather than compelling it, * * * state officials remain accountable to the people." *Id.*; *see id.* at 185.

A third means of using the States as "implements of regulation" is not valid. Congress cannot "cross[] the line distinguishing encouragement from coercion," *id.* at 175, and "compel the States to enact or administer a federal regulatory program." *Id.* at 188. "[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished." *Id.* at 168; *see id.* at 168-69, 182-83.

In *New York*, this Court held that Congress cannot require a State either to take title to low level radioactive waste generated by private parties within its borders, or to regulate the disposal of such waste "according to the instructions of Congress." *Id.* at 175. Both of these alternatives are unconstitutional, and "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all." *Id.* at 176. With regard to the first alternative, Congress simply has no power "to transfer radioactive waste from generators to state governments." *Id.* at 175. Moreover, in language that speaks directly to the Brady Act, this Court found that "the second alternative held out to state governments—regulating pursuant to Congress' direction—would, standing alone, present a simple command to implement legislation enacted by Congress [and] * * * the Constitution does not empower Congress to subject state governments to this type of instruction." *Id.* at 175-76.

B. The Brady Act Blurs Political Accountability Because It Divorces Responsibility For Substantive Policies From The Duty To Enforce

The Brady Act, just like the alternative to taking title to low level radioactive waste, requires the States and local governments to regulate private activity "according

to the instructions of Congress." *See* 505 U.S. at 175. CLEOs must conduct background checks on prospective handgun purchasers, destroy certain information and records, and provide in certain circumstances a written explanation of a determination that an individual is not eligible to purchase a handgun. *See* 18 U.S.C. § 922(s)(2); *id.* § 922(s)(6)(B)(i); *id.* § 922(s)(6)(C).

The Brady Act impermissibly blurs the political accountability of Congress and of the States because responsibility for substantive handgun regulation policies is divorced from the duty to provide the administrative and financial resources required to enforce these policies. Although Congress established the substantive policy that handgun purchasers are subject to background checks, it compelled the States and local governments to provide the enforcement resources. There is no political check because Congress does not have to appropriate any funds or allocate any administrative resources to enforce its policies. If Congress had adopted either one of the two means approved by this Court in *New York v. United States*, and induced CLEOs to enforce the federal background check regulations as a condition of a federal grant or under a threat of federal preemption and enforcement by the ATF, then Congress would bear at least some of the enforcement costs. By shifting these costs entirely to States and local governments, however, Congress escapes political accountability. Indeed, one cannot even be confident that a majority of both houses of Congress would have imposed a background check requirement if the federal government had to spend federal funds or reallocate federal law enforcement personnel to this task.

While Congress escapes political responsibility under Brady, state and local officials are held accountable for decisions made by the federal government. State and local legislatures, as well as CLEOs, are compelled under the Brady Act to allocate their limited administrative and

financial resources to implement federal policies even though their constituents may "prefer their government to devote its attention and resources to problems other than those deemed important by Congress." *New York v. United States*, 505 U.S. at 168. CLEOs must allocate administrative and financial resources to perform the regulatory duties imposed by the Brady Act. If there is no increase in their budgets, these state and local officials will have to decrease enforcement of state and local laws. In these circumstances, state or local legislative bodies will then be forced either (1) to increase the budgets of CLEOs by raising taxes or reallocating resources from other areas of the budget or (2) to acquiesce in the reduction of state and local law enforcement by CLEOs. *See* Printz Pet. App. 54a-55a.

State and local CLEOs will be held accountable by their constituents for decreased enforcement of state and local laws even though they did not have any choice about whether to allocate resources to enforce the Brady Act. State and local legislatures will be held accountable by their constituents for reduced services or increased taxes even though they did not have any choice about whether to provide resources to enforce the Brady Act. Thus, the Brady Act blurs political accountability in a way that threatens democratic self-governance in the States. *See* Deborah J. Merritt, *Three Faces of Federalism: Finding A Formula For The Future*, 47 Vand. L. Rev. 1563, 1580 n. 65 (1994) ("Although the [Brady] Act specifically exempts local officers from civil liability for erroneous determinations, it does not shield them from popular criticism or electoral retaliation for those decisions.") (citation omitted).

If, however, state or local regulation of handgun transfers is a condition of a federal grant or an alternative to federal preemption and ATF enforcement, then both state and local legislatures and CLEOs can choose whether to allocate their resources to enforce federal law. If state

or local citizens "prefer their government to devote its attention and resources to problems other than those deemed important by Congress," *New York v. United States*, 505 U.S. at 168, they can decline a federal grant or leave enforcement of background checks to the ATF. If the Brady Act offered the States these choices, "state governments [would] remain responsive to the local electorate's preferences; state officials [would] remain accountable to the people." *Id.*

The court of appeals did not apply this Court's political accountability test. Instead, it claimed that "*New York* was concerned with a federal intrusion of a different kind and much greater magnitude than any involved in the Brady Act." Printz Pet. App. 10a. With regard to the "kind" of federal intrusion, the court of appeals read *New York* as confined to protecting only the States' legislative or policymaking processes. *Id.* at 12a-13a & n.7. It then concluded that "CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations" and that, "[i]nstead, they are directed to serve for a temporary period as law enforcement functionaries in carrying out a federal program." *Id.* at 14a.

There is no warrant for this purported distinction between policymaking and policy enforcement. Even if the *New York* Court was primarily concerned about the effect of federal mandates on state legislatures, it does not follow that there should be no concern about the effects of the Brady Act's mandates on state and local executive branch officials. The question is not whether this Court's disapproval of federal mandates in *New York* was confined to interference with state legislatures, but instead whether the effects of the Brady Act on the States also raise fundamental problems of political accountability.

Apart from a brief mention that the States "must bear political accountability" for a state policy, *id.* at 12a, the court of appeals did not address the issue of political

accountability. *But see Koog v. United States*, 79 F.3d at 460-61 (discussing problems of political accountability raised by the Brady Act). It did not offer any explanation for its tacit assumption that the States' policymaking, but not their allocation of resources, is the only aspect of democratic self-governance protected by the Constitution. Moreover, the court of appeals' assumption that some aspects of democratic self-governance are more important, more "central" than others, is unworkable and unwarranted. There is no reason why, for example, legislative policymaking is any more "central" to democratic self-governance than a CLEO's decision about allocation of limited law enforcement resources between federal background checks of gun purchasers and state background checks of individuals seeking employment in child care facilities.

In any event, the court of appeals' attempt to distinguish *New York* on the ground that the statute therein imposed a duty on state legislative processes fails on its own terms. The argument begins with the concession that under *New York* Congress could not compel States to enact laws requiring CLEOs to conduct background checks and assumes "that Congress is somehow on *better* constitutional footing if it by-passes the state legislature" completely and "directly compels state and local officials" to enforce federal regulations. *Frank v. United States*, 860 F. Supp. at 1042-43. Under this line of reasoning, Congress could make an end-run around *New York*. Congress would never have to encourage or compel state legislatures to enact legislation: Congress could simply by-pass the middleman and require state and local executive officials to enforce federal regulations. *Id.* at 1043.

The court of appeals also erred in reading a balancing test into *New York*. It held that the Brady Act imposes "minimal interferences with state functions" and that it does not "stall the state government in its tracks by imposing all-consuming federal duties on the State's employees." Printz Pet. App. 13a-14a. This judicial second-

guessing about the sheriffs' burdens in meeting their Brady Act duties and the implicit balancing of federal and state interests are inconsistent with this Court's express rejection of a balancing test. *See New York v. United States*, 505 U.S. at 178 ("Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.").

III. THE FRAMERS INTENDED THAT VOLUNTARY COOPERATION BETWEEN THE STATES AND THE FEDERAL GOVERNMENT WOULD BE AN INTEGRAL PART OF OUR FEDERAL SYSTEM

A. The Duties Imposed By Congress On CLEOs To Enforce Federal Law Are Inconsistent With The Lessons Of History

In *New York v. United States*, this Court reviewed the history of the Articles of Confederation and the adoption of the Constitution and concluded that the Constitution does not "permit Congress to employ state governments as regulatory agencies." [10] *See* 505 U.S. at 163; *see also*

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[10] One commentator argues that the Court misread this history. *See* Saikrishna B. Prakash, *Field Office Federalism*, 79 Va. L. Rev. 1957 (1993). Although the Framers intended to prohibit Congress from issuing commands to state legislatures, they did not intend to prohibit Congress from using "state executives and courts [as] the 'bureaucratic puppets' and 'field offices' of the federal government." *Id.* at 2037. These arguments, however, do not take into account the statutes enacted by Congress after adoption of the Constitution, which, as discussed below, confirm the *New York* Court's reading of constitutional history.

Another commentator argues that this Court's conclusion in *New York* is inconsistent with an earlier decision, *Testa v. Katt*, 330 U.S. 386 (1947). *See* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1060 (1995). This Court nonetheless correctly rejected the argument that the Supremacy Clause gives Congress power to compel state executive officials to enforce federal regulations. *New York v. United States*, 505 U.S. at 178-79; *see* La Pierre, 60 Wash. U. L.Q. at 944-45.

id. at 163-66. The Court found that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.* at 166. Although the Framers intended that the federal government would be able to act directly through its own officers and that it would not have to rely on the States to execute federal law, they also anticipated voluntary state cooperation.[11] *See United States v. Jones*, 109 U.S. 513, 519-20 (1883).

Beginning with the first administration of President Washington, Congress has relied on state assistance to implement federal law. *See* Leonard D. White, *The Federalists: A Study In Administrative History* 387-405 (1948) (discussing state cooperation in the administration of federal law in the early years of the republic). In providing for state enforcement of federal law, Congress authorized state officials to act, but, with only a few exceptions, it did not impose any duty on them to enforce federal laws. In reviewing these statutes, the courts almost invariably maintained that the delegation of federal authority could not expand the state law authority of the delegate and that state officials must have adequate au-

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[11] For example, THE FEDERALIST recognizes that Congress can "make use of the State officers and State regulations, for collecting" federal taxes. THE FEDERALIST, No. 36 at 227 (A. Hamilton) (J. Cooke ed. 1961); *see also id.* at 226 (in assessing and collecting taxes, "[t]he national Legislature can make use of the *system of each State within that State*" (emphasis in original); *id.*, No. 45 at 313 (J. Madison) ("[i]ndeed it is extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be cloathed with the correspondent authority of the Union); *id.*, No. 27 at 174 (A. Hamilton) (the Constitution "will enable the government to employ the ordinary magistracy of each [State] in the execution of its laws").

These statements about use of state officers fall far short of any assertion that Congress could impose a duty on state officers to enforce federal law. Hamilton's and Madison's statements are most easily understood, consistent with the actual practices of early Congresses, as a recognition that the federal government could rely on States' voluntary cooperation to enforce federal law.

thority under state law to exercise the delegated federal authority. *See* La Pierre, 60 Wash. U. L.Q. at 1039-46.

For the most part, early statutes delegated federal authority to state judicial officers to perform quasi-judicial functions and a few functions that are more clearly executive.[12] Beginning with the Judiciary Act of 1789, Congress authorized state justices of the peace and magistrates, at the expense of the United States, to arrest, imprison, and admit to bail offenders of the criminal laws of the United States.[13] Congress also authorized depositions *de bene esse* to be taken by state court judges and mayors.[14] Although the courts never considered the validity of the latter delegation, they consistently upheld Congress' power to delegate authority to arrest, imprison, and bail federal law offenders.[15] Congress subsequently delegated similar authority to state judicial officers to arrest deserting seamen [16] and fishermen,[17] to grant bail to persons arrested for violating federal laws regulating trade with the In-

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[12] Congress' practice of delegating federal authority primarily to state judicial officers to perform quasi-judicial functions is explained in part by the Madisonian Compromise and the understanding that state courts would exercise jurisdiction over cases within the Article III judicial power.

[13] Act of September 24, 1789, ch. 20, § 33, 1 Stat. 91-92.

[14] Act of September 24, 1789, ch. 20, § 30, 1 Stat. 88-90.

[15] *Ex parte Gist*, 26 Ala. 156 (1855); *Harris v. Superior Court*, 196 P. 895 (Cal. App. 1921); *Goulis v. Stone*, 140 N.E. 294 (Mass. 1923); *Commonwealth v. Holloway*, 5 Binn. 512 (Pa. 1813); *Ex parte Rhodes*, 12 Niles' Weekly Register 264 (S.C. 1817). *Contra Maryland v. Rutter (Almeida's Case)*, 12 Niles' Weekly Register 115, 231 (Baltimore County Court 1817); *Ex parte Pool*, 4 Va. Cas.) 276, 284-91 (1821) (Semple, J., dissenting) (dictum).

[16] Act of July 20, 1790, ch. 29, §§ 3 & 7, 1 Stat. 132-34. *See Robertson v. Baldwin*, 165 U.S. 275 (1897) (upholding Congress' power to authorize state justices of the peace to arrest deserting seamen); *Ex parte Pool*, 4 Va. (2 Va. Cas.) 276 (1821) (same).

[17] Act of June 19, 1813, ch. 2, § 1, 3 Stat. 2.

dians,[18] to issue search warrants,[19] to take depositions in claims against the United States,[20] and to take testimony in cases of disputed congressional elections for submission to the clerk of the House of Representatives.[21]

In addition to these statutes delegating authority to perform quasi-judicial functions, other statutes delegated authority to state judicial officers to perform functions that seem to be more executive or administrative in nature, such as the naturalization of aliens.[22] All the courts that considered the question of Congress' power to delegate authority to state courts to naturalize aliens upheld this power, but the opinions usually noted that the state courts

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[18] Act of March 30, 1802, ch. 13, § 16, 2 Stat. 144-45.

[19] Act of March 2, 1799, ch. 22, § 68, 1 Stat. 677-78.

[20] *See United States v. Bailey*, 34 U.S. (9 Pet.) 238, 254 (1835) (collecting statutes).

[21] Act of January 23, 1798, ch. 8, §§ 5-6, 1 Stat. 538.

[22] Congress authorized state and federal courts to admit aliens to citizenship and provided that the clerks of these courts "shall record" citizenship applications. *See* Act of April 14, 1802, ch. 28, § 1, 2 Stat. 153-54; Act of January 29, 1795, ch. 20, §§ 1-2, 1 Stat. 414-15; Act of March 26, 1790, ch. 3, § 1, 1 Stat. 103-04 (1790). A few provisions of these early naturalization statutes specifically imposed a "duty" on the clerks of these courts, but Congress paid the clerks to perform these duties. *See* Act of April 14, 1802, ch. 28, § 2, 2 Stat. 154-55; Act of June 18, 1798, ch. 54, §§ 2-4, 1 Stat. 567-68.

In addition to naturalization, two other statutes are examples of delegation of federal authority to state judicial officers to perform administrative functions. Congress authorized state court judges to take proof of the circumstances that would entitle refugees from Canada and Nova Scotia to a bounty paid by the Department of War. Act of April 7, 1798, ch. 26, § 3, 1 Stat. 548. Congress also authorized judges of "a county court of the State of Oklahoma" to supervise land conveyances by Indians, and the Oklahoma Supreme Court approved this delegation of power where the state legislature had authorized the county courts to act in the capacity provided by federal law. *Marcy v. Board of Comm'rs*, 144 P. 611 (Okla. 1914).

had authority under state law to perform this function for the federal government and frequently added that Congress could not compel performance of this task.[23]

Most of these early statutes simply delegated authority to state judicial officers, and only two statutes imposed a duty on these officers to perform either quasi-judicial or executive functions.[24] In our nation's early years, Congress frequently turned to state judicial officials to assist in the enforcement of federal law, but it made only one provision for assistance by state executive officers. In section one of the Fugitives from Justice and Fugitive Slave Act of 1793, Congress imposed a duty on the executive authority of each State to arrest and deliver fugitives from other States.[25] Although there are a few other federal statutes and regulations imposing duties on state executive officials, Congress, for the most part, has looked to voluntary state cooperation. *See* La Pierre, 60 Wash.

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[23] *See, e.g., Holmgren v. United States*, 217 U.S. 509 (1910); *Levin v. United States*, 128 F. 826 (8th Cir. 1904); *State v. Penney*, 10 Ark. 621 (1850); *In re Conner*, 39 Cal. 98 (1870).

[24] In 1790, Congress required justices of the peace to determine the fitness of a ship bound on a voyage to a foreign port upon a complaint that the vessel was not seaworthy. Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132-33. In 1793, Congress required federal judges and state magistrates to grant a warrant for the removal of recaptured fugitive slaves. Fugitives from Justice and Fugitive Slave Act of 1793 (Act of February 12, 1793), ch. 7, § 3, 1 Stat. 302-05. In *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), several members of this Court commented extensively on the question of Congress' power to impose this duty on state magistrates, but they decided the case on much narrower grounds.

[25] Act of February 12, 1793, ch. 7, § 1, 1 Stat. 302. Notwithstanding the constitutional provision requiring extradition of fugitives from justice, U.S. Const. art. IV, § 2, cl. 2, this Court held in 1861 that Congress "has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107 (1861), *overruled by Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987) (recognizing Congress' power to enforce "the dut[ies] . . . directly imposed upon the States by the Constitution itself").

U. L.Q. at 1023-33, 1046; *but see* Caminker, 95 Colum. L. Rev. at 1044-45 (reading a sample of early statutes more broadly).

In short, our early history demonstrates that Congress relied on voluntary state cooperation to enforce federal law, and it provides only scant support for a putative power to impose a duty on either state judicial or state executive officials to enforce federal law. The statutes enacted by the earliest Congresses provide an important guide to understanding the Framers' constitutional plan, *see, e.g., Myers v. United States*, 272 U.S. 52, 175 (1926), and they confirm this Court's determination in *New York* that the Constitution does not "permit Congress to employ state governments as regulatory agencies." 505 U.S. at 163. The past has been prologue to the present—modern statutes imposing duties on state officials to regulate private activity are rare. *See* La Pierre, 60 Wash. U. L.Q. at 1033-34; *see also* Caminker, 95 Colum. L. Rev. at 1002-03 & n.3.

B. Congress Has Constitutionally Valid Means To Provide For Background Checks

There is no need to extrapolate any power to compel state and local officials to enforce federal regulatory programs. If federal regulations, like the Brady Act, are sufficiently important, Congress can establish an entirely federal program, like the permanent provisions of the Brady Act. During the interim period before establishment of the national instant criminal background check system, Congress could easily have charged the ATF with the responsibility of making background checks.[26]

Moreover, as this Court recognized in *New York v. United States*, Congress has "a variety of methods, short of outright coercion," to provide for state enforcement of federal regulations like the Brady Act. *See* 505 U.S. at

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[26] Of course, the ATF would have needed additional resources to implement the Brady Act. *See* GAO Report at 52.

166. Congress could have assumed some of the costs of its regulatory program by authorizing and appropriating funds for grants to States and local governments that agreed to enforce federal handgun regulations by making background checks.[27] CLEOs would then have been able to enforce federal law without compromising their responsibility to enforce state law. Instead of imposing a duty on States to enforce the Brady Act, Congress could also have preempted state regulation of handgun transfers in States that do not have state laws meeting federal standards.[28] Under this approach, Congress and the ATF would have borne the enforcement costs in States that chose not to enforce the federal regulations. Finally, Congress could simply have delegated federal authority to enforce the Brady Act and relied on the voluntary cooperation of state and local CLEOs to conduct background checks of handgun purchasers.

C. Congress Could Reasonably Rely On Voluntary Enforcement Of The Brady Act

Provisions authorizing state enforcement of federal law are legion. Since the inception of the republic, Congress has authorized state officials to arrest federal offenders. *Compare* Act of September 24, 1789, ch. 20, § 33, 1 Stat. 91-92 *with* 18 U.S.C. § 3041. Voluntary enforcement of federal law by state officers is now commonplace. *See, e.g., United States v. Bowdach*, 561 F.2d 1160, 1167-68 (5th Cir. 1977) (execution of federal arrest warrant by state police officer). Instead of imposing duties on

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[27] Although Congress did not appropriate any funds to CLEOs to cover the costs of background checks, the Brady Act authorizes $200 million in funds to States to create or improve computerized criminal record systems or their access to the national instant criminal background system. 18 U.S.C. § 922 Note. Congress has appropriated $100 million of these funds. Pub. L. No. 103-317, 108 Stat. 1724, 1777 (1994).

[28] Twenty-six States have laws meeting federal standards. *See* GAO Report at 4, 18, App. II.

state officials, the federal government has looked to voluntary state cooperation to enforce federal law.[29] In delegating authority to state officials, the federal government has honored state law limits on the authority of state officials to enforce federal regulations.[30] Delegation of authority to the States to enforce federal law and voluntary cooperation by state and local officials is now so pervasive that it is little noted and rarely challenged. *See* La Pierre, 60 Wash. U. L.Q. at 797-98, 1023-28.

Confidence that Congress could rely on the voluntary cooperation of most CLEOs to make background checks is not misplaced. Most state and local law enforcement officials favor background checks for handgun purchasers. *See* GAO Report at 48 n.45 (listing ten police associations and organizations that have filed briefs *amici curiae* in the courts of appeals in support of the Brady Act). When local CLEOs have declined to enforce the Brady Act, state agencies have filled the void. *See id.* at 51. Thus, Congress simply could have delegated authority to make federal background checks to state and local officials and relied on their voluntary cooperation. As the ATF has noted, "the

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[29] For example, during World War I Congress authorized the President to use the services of any state officer in raising military forces and required these officers to perform any duty directed by the President. Act of May 18, 1917, ch. 15, § 6, 40 Stat. 80-81. The President, however, did not exercise any power to give orders to state officers. Instead, the Governors agreed to cooperate, and the President's orders were in fact issued by the Governors. J. P. Clark Carey, *The Rise of a New Federalism* 90-92 (1938); Note, *The President, the Senate, the Constitution, and the Executive Order of May 8, 1926*, 21 Ill. L. Rev. 142, 144 (1926).

[30] President Coolidge issued an executive order authorizing the appointment of state and local officials as prohibition officers of the federal Department of the Treasury to enforce the National Prohibition Act "except in those states having constitutional or statutory provision against state officers holding office under the federal government." Exec. Order No. 4439, May 2, 1926, *quoted in* Note, *supra* note 29, at 143; *see* James Hart, *Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement*, 13 Va. L. Rev. 86, 99-107 (1926).

CLEO of the buyer's residence has a vested interest in conducting an appropriate check" because that official "is the one who is most likely to have to deal with the consequences of the buyer obtaining a handgun." ATF, Open Letter, U.S. App. 15a.

Unfortunately, Congress did not choose any of these constitutionally valid means of providing for state and local enforcement of federal handgun regulations. Instead, the Brady Act violates the constitutional principles of political accountability that are at the foundation of our federal system. Handgun crimes and the shortage of sites for the disposal of radioactive waste are, without question, both "pressing national problem[s], but a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse." *New York v. United States*, 505 U.S. at 187-88.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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